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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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11 UNITED STATES OF AMERICA,

No. C 99-00316 CRB

12 Plaintiff,

**ORDER**

13 v.

14 RODOLFO ZEPEDA-MORENO,

15 Defendant.  
16 \_\_\_\_\_/

17 In July of 1999, Defendant was indicted for entering the United States illegally in  
18 violation of 8 U.S.C. § 1326. According to the indictment, Defendant had previously been  
19 deported from this country six times, in 1977, 1980, 1985, 1988, 1996, and 1997, and had  
20 nonetheless reentered the country. Defendant entered a plea of guilty, and in December of  
21 1999, this Court sentenced him to fifty-seven months of imprisonment and three years of  
22 supervised release. Upon his release in 2003, Defendant was deported to Mexico.

23 In February of 2005, the Court issued a bench warrant for Defendant's arrest. The  
24 warrant was based on a violation of one of the terms of Defendant's supervised release,  
25 namely, the requirement that he not reenter the United States (which he did, on or about  
26 September 20, 2004).

27 Now pending before the Court is a motion filed by Defendant that challenges the  
28 revocation of his term of supervised release. In support of this motion, Defendant sets forth

1 several arguments: (1) that the bench warrant for his arrest was invalid because it was not  
2 supported by “oath or affirmation” as required by the Fourth Amendment, (2) that revocation  
3 of his supervised release is improper because the government did not adequately inform him  
4 of the terms of his supervised release, and (3) that the term of supervised release imposed on  
5 him was improper in the first place because 8 U.S.C. § 1326 does not require such a term of  
6 supervised release, and (4) that the imposition of supervised release somehow violated  
7 Defendant’s right to a jury trial under the Sixth Amendment. None of these arguments are  
8 persuasive.

9 First, the bench warrant for Defendant’s arrest *was* supported by oath or affirmation,  
10 namely, the oath of probation officers Richard Ortiz and Marlana Peter. Second, Defendant  
11 *was* informed of the terms and conditions of supervised release, both orally by this Court at  
12 sentencing and in writing by service of a copy of the judgment in this case, which  
13 specifically provides that “[t]he defendant shall not commit another federal, state, or local  
14 crime,” including the crime of illegal reentry into the United States. Third, the term of  
15 supervised release was entirely proper in this case. Although Defendant may be correct in  
16 his argument that nothing *requires* the imposition of a term of supervised release for a  
17 violation of 8 U.S.C. § 1326, he points to no authority for the proposition that a term of  
18 supervised release is *prohibited*. Therefore, even assuming the correctness of Defendant’s  
19 argument (an issue that the Court does not reach), it does not affect the legality of his  
20 sentence, for there is nothing to suggest that this Court was not well within its authority to  
21 impose a term of supervised release. Fourth, the Court is unpersuaded that any of the terms  
22 or circumstances of Defendant’s sentencing run afoul of the Sixth Amendment. To begin, at  
23 the time of Defendant’s sentencing, the Supreme Court had not established that there was  
24 anything improper about any judicial factfinding during the sentencing process, and the  
25 Ninth Circuit has established the Supreme Court’s decision in United States v. Booker, 543  
26 U.S. 220 (2004), does not apply retroactively. See United States v. Cruz, 423 F.3d 1119,  
27 1120 (9th Cir. 2005). Further, even if those Sixth Amendment principles applied to this case,  
28 Defendant still could not prevail, since he admitted through his guilty plea all of the facts

1 necessary to support his sentence, including the three-year term of supervised release.  
2 Booker, 543 U.S. at 244 (“Any fact (other than a prior conviction) which is necessary to  
3 support a sentence exceeding the maximum authorized by the facts established by a plea of  
4 guilty or a jury verdict *must be admitted by the defendant* or proved to a jury beyond a  
5 reasonable doubt.” (emphasis added)).

6 Finally, even if Defendant is correct that his original sentence or his term of  
7 supervised release is infected by legal error, this Court no longer enjoys jurisdiction to  
8 correct such an error. United States v. Penna, 319 F.3d 509, 510- 12 (9th Cir. 2003); United  
9 States v. Barragan-Mendoza, 174 F.3d 1024, 1029 (9th Cir. 1999). To the extent that  
10 Defendant challenges the legality or constitutionality of the sentence itself, the only forum to  
11 raise such a challenge is on direct appeal or through a habeas petition, see 28 U.S.C. § 2255,  
12 if an application for such relief can be timely made.

13 For all of these reasons, Plaintiff’s motion to set aside this Court’s revocation of his  
14 supervised release is hereby DENIED.

15 **IT IS SO ORDERED.**

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18 Dated: April 30, 2007



CHARLES R. BREYER  
UNITED STATES DISTRICT JUDGE